United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1203

ORIGINAL

To be argued by
MARTIN LEVINE

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

FRANK D. BALECHA,

Plaintiff-Appellee,

vs.

UNION CARBIDE CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLEE

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In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1203

FRANK D. BALECHA,

Plaintiff-Appellee,

-against-

UNION CARBIDE CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE

THE QUESTION ON APPEAL:

PRELIMINARY STATEMENT

After a two-day trial presided over by

Honorable Lloyd F. MacMahon, United States District Judge, the plaintiff-appellee (hereafter appellee) presented his case to a jury which returned a verdict in his favor of $18,100.00.

Does the defendant-appellant (hereafter appellant) show just cause as should warrant the setting aside of this verdict and the ordering of a second trial?

STATEMENT OF FACTS AND ISSUES

Appellee, a merchant seaman, instituted an action in the Court below against the appellant to recover damages for the personal injuries he sustained aboard the S.S. "Carbide Texas City" (hereafter "the vessel") in the course of his employment thereon as a member of the crew.

The action was brought under the provisions of the Jones Act, (Title 46, U.S.C.A., Section 688 et seq.) and under the provisions of the General Maritime Law of the United States, and in it appellee alleged that he had been caused to be injured by reason of the negligence of the defendant shipowner who failed to afford him a safe place to work on March 27, 1972 and who, on that date, failed to afford him a seaworthy vessel. Appellee further alleged

that the effects of the injuries thus sustained thereafter persisted and resulted in a permanent impairment of the function of his left shoulder, adversely affecting his ability to perform his normal duties on "the vessel", and that this impairment was demonstrated by the (consequential) incident of March 8, 1973.

On the trial the appellee proved by a preponderance of the credible evidence that:

(1) On March 27, 1972, he was caused to slip, lose his balance and to strike his left shoulder against a bulkhead as a result of a negligent and unseaworthy condition.

(2) He was proximately injured thereby to a substantial and permanent extent.

(3) In consequence of these injuries and/or their sequelae he suffered a second incident on March 8, 1973.

(4) He suffered past, present and future pain and suffering.

(5) He was disabled from work and suffered a loss of earnings and income.

POINT I

THE JURY VERDICT WAS PREDICATED ON THE POSITIVE SUBSTANTIAL EVIDENCE ADDUCED ON THE TRIAL BY THE APPELLEE.

A summary and analysis of the factual evidence adduced on the trial indicates that the jury had before it when it deliberated, testimony from the plaintiff that the refrigerator leaked (16a, 23a, 158a, 159a) and that the water after making contact with the motor flowed onto the deck (23a) of the messroom (24a) as well as the testimony of appellant's own witness, the vessel's Third Mate, who had prepared the accident report (180a, 181a) -- appellee's Exhibit 9 in evidence (43a, 181a); that when on July 8, 1972 it had been reported to him that the refrigerator was leaking he

> ".... then went and asked the Chief Engineer if the refrigerator had been fixed and he (the Engineer) told me that it had" (183a)

and that the refrigerator

> ".... had been leaking prior to this accident some time in 1971 I think ...." (184a)

The jury also then had before it appellee's testimony, under cross-examination, in which he asserted, that despite what the United States Public Health Service Hospital records and the N.M.U. Upgrading School records may have recorded, he had not previously suffered, complained of and/or been treated for a left shoulder injury (80a, 81a) and had been able to pursue his upgrading school activities without any absences over a seven months period (except for two days on which he went to have x-rays taken) and that his left shoulder was pain free over this period of seven months before he joined "the vessel" in suit (85a, 86a).

The jury had before it appellee's version of what occurred at the chill box door (34a, 35a); and it had before it appellant's version of what it claims happened, through the testimony of "Britton", "the vessel's" Chief Steward (189a, 194a, 195a); and through the report of injury prepared on "the vessel", appellant's Exhibit E (185a, 241a, 242a).

The jury also had before it in its deliberations, substantial medical testimony that the appellee had suffered an injury other than the mere contusion of

temporary duration as diagnosed by appellant's medical expert, Dr. Lodico (122a, 123a); and that the x-rays which Dr. Lodico had ordered taken by Dr. Robbins and which x-rays he had himself reviewed (119a) did not show the degree of bilateral osteoarthritic changes which Dr. Lodico considered the real cause of appellee's shoulder problems (116a, 120a, 121a, 122a, 125a, 126a, 127a).

On the contrary, on cross-examination, Dr. Lodico admitted that the report of the radiologist, Dr. Robbins, showed that

> ".... the osseous structure is excellent throughout the left shoulder. There is most minimal irregularity at the greater tuberosity itself. I see no calcification in the soft tissue or any other pathology" (130a, 131a)

and that this minimal osteoarthritic condition was restricted to the left shoulder (131a).

Dr. Lodico also admitted on cross-examination that the appellee's United States Public Health Service Hospital medical charts received in evidence -- appellee's Exhibits 2, 3 and 4 (31a) showed that after making the initial diagnosis of contusion of the left shoulder on the occasion of the appellee's first visit to the hospital --

in the General Clinic -- (132a) on July 10 (133a), the hospital's physicians in the Orthopedic Clinic which he visited on July 18, 1972, pursuant to appointment made, after noting the appellee's complaints of pain and discomfort and his complaint that he was unable to adduct the left shoulder greater than 60°, felt that the patient was suffering from "a frozen left shoulder, allegedly falling, direct injury to left shoulder in March, 1972" and found, objectively "slight atrophy of the supra and infra spinatous of the left shoulder and moderate atrophy of the deltoid" (134a) and Dr. Lodico further admitted that the hospital chart for July 18, 1972 did not make mention of a contusion of the left shoulder (134a).

The jury also had before it the testimony of Dr. Benjamin S. Golub, appellee's medical expert, a qualified orthopedic surgeon (88a, 89a) that in his examination of the appellee on October 17, 1972, he found scapular, muscular atrophy of the left shoulder (90a, 95a, 96a), tenderness over the insertion of the cuff at the greater tuberosity (90a, 95a, 105a) limitation of motion and weakness involving the left upper extremity (91a, 95a) which was not present on the right side (90a); and that he

concluded on the basis of the foregoing that the appellee had suffered a significant partial cuff tear at the left shoulder (92a, 106a, 108a, 109a, 110a), the effect of which was to permit partial motion with considerable weakness (93a, 107a); that the accident which the plaintiff had sustained on March 27, 1972 (16a) was the proximate cause of the conditions which he, Dr. Golub, had found (94a).

Dr. Golub in his testimony denied that the bony thickening of the greater tuberosity (96a) affected adversely appellee's shoulder motion (97a, 107a); and he further testified that the severe pain which the appellee suffered in his left arm in March, 1973, when he leaned against the 500-pound chill box door in an attempt to hold it open, was medically related to the original injury, it being,

> "an aggravation, a painful aggravation of his pathology at that time." (99a)

It was also Dr. Golub's testimony that the prognosis with respect to the left shoulder was guarded and that the outlook was not particularly good for significant improvement (99a); that the condition which the appellee was suffering would not be benefited by surgery and that surgery was not indicated (100a, 101a);

and that the appellee would suffer future pain and suffering under certain stress activity (111a).

* * * * * * * * * * * * * * * *

The jury as triers of the facts deliberated on all the evidence presented to it during the trial and it returned a verdict in favor of the appellee.

Nor does appellant urge that the evidence actually presented to the jury was in and of itself of insufficient weight and substance to sustain the verdict and/or the verdict was excessive.

POINT II

THE TIME LIMIT IMPOSED BY THE TRIAL JUDGE WAS A PROPER EXERCISE OF HIS AUTHORITY.

Appellee does not dispute the principle that

> ".... the right to cross-examine a witness is fundamental to our judicial system."
>
> Alford v. United States, 282 U.S. 687 (1930);
>
> Iva Ikuko Toguri D'Aquino v. United States, 192 F. 2d 338, 369 (9 Cir. 1950).

but he respectfully submits that it is not this principle which is now under consideration on this appeal.

The questions to be decided are: did the trial judge have the discretionary authority to impose a time limit within which all further cross-examination was to be concluded; and if he did have the authority, was the time limit so imposed by him a reasonable exercise of that authority.

"Harries" cited by appellant in its brief, is a case in which the trial judge having admonished counsel who was cross-examining a witness to ".... make it as brief as possible. We have to save time. We are going to

finish this trial today, gentlemen. Proceed"; and having later warned him "You may have ten more minutes to complete cross-examination", held counsel to that time limit over counsel's objections and terminated the cross-examination.

On an appeal from that ruling it was held:

> "We think the trial court did not abuse its discretion in calling a halt on the basis of the indicated time limitation."
>
> Harries v. United States, 350 F. 2d 231 (9 Cir. 1965) p. 236 and footnote.

The Circuit Court, in its opinion further pointed out that:

> "Had counsel for plaintiff presented the Court with an offer of proof indicating that crucial new areas needed to be explored, further latitude .... might have been indicated and doubtless would have been permitted ...." (Emphasis supplied)

Appellee points out elsewhere in this brief that by virtue of appellant's approach to and treatment of the chill box door incident (p.19) the trial judge in the case at bar was amply justified in concluding that appellant's counsel's need for more time (177a, 178a) was not at all "crucial". (p. 20)

In a parallel situation it was held in this

Circuit that a trial judge did not abuse his discretion where after appropriate warning he prescribed a time limit within which the defense had to have its witnesses in Court available to testify on the trial.

> United States v. Campisi, 292 F. 2d 811 (2 Cir. 1961).

Counsel for appellant seeks to suggest in his brief (pp. 8, 9) that when the Court issued its warning

> ".... five minutes more, Mr. Carr, no more." (174a)

counsel was then at a critical stage of his cross-examination of the appellee, and, therefore (it would appear) he could not at that point drop the topic on which he was cross-examining and go on to something else, because, he says in his brief (p. 8), he had gotten appellee to acknowledge

> ".... that the deck looked clean and shiny .... It doesn't look wet." (175a)

and it therefore followed, his brief says

> ".... it began to appear that there was no competent evidence of a leak and that instead plaintiff had merely slipped on a freshly mopped deck ...." (p. 8)

This interpretation, offered by appellant's trial

counsel, is not however borne out by the record, which, when quoted in full, discloses that when counsel asked him as to whether he had looked at the deck, appellee testified:

"Q Let's forget about the conversation. When you started to walk, did you look at the deck to see whether it was wet or not?

A Yes.

Q And what was it? What did it look like to you?

A It looks clean and shiny. I couldn't tell whether it is wet or dry because the light is too bright.

Q It looked clean and shiny.

A Looked clean and shiny.

Q Did it look wet?

A It doesn't look wet." (175a);

an obvious explanation by appellee that he could not appreciate the true condition of the deck because of the reflection effect of the overhead bright light shining upon it (175a).

On this same level, appellant's counsel, in his brief, (pp. 8, 9) seeks to convey the impression that he had not previously been warned by the trial judge to limit his examination of witnesses.

The trial judge stated in his opinion, denying appellant's motion for a new trial under Rule 59, Federal Rules of Civil Procedure, that appellant's trial counsel had received from the Court

> ".... repeated warnings .... from the start of the trial to present this simple case within one day (which) defense counsel persisted in ignoring ...." (244a, 245a)

Recognizing, that in this Circuit, the discretion of the trial judge to control the scope and length of cross-examination has been variously defined

as:	extensive	United States v. Kahn, 472 F. 2d 272 (2 Cir. 1973);
as:	wide	United States v. Bowe, 360 F. 2d 1 (2 Cir. 1966);
and as:	broad	United States v. Dorfman, 470 F. 2d 246 (2 Cir. 1972),

and by the Supreme Court of the United States

as:	large	Jencks v. United States, 352 U.S. 657, 674 (1956),

because, as was expressed in another circuit, on an appeal challenging this concept:

> ".... court orders which bear on restricting cross-examination of a witness are rulings which are peculiarly susceptible to the trial court's decision; also these are

matters with which appellate courts cannot effectively deal ...."

United States v. Gant, 487 F. 2d 216 (10 Cir. 1973);

so that in our Federal Court system there is maintained the doctrine that in a jury trial, the trial judge is entrusted with its proper conduct

".... not (as) a mere moderator, but (as) a governor ...."

Herron v. So. Pac., 283 U.S. 91, 95 (1931),

appellee's trial counsel, with the repeated admonitions of the trial judge ever before him, was able to tailor and to curtail the extent and duration of his examinations of the witnesses, without prejudice to the full and proper presentation of his case even though the trial judge had predetermined a tight schedule; and even if the trial did proceed, at a pace which appellant's trial counsel in his brief (p. 3) characterizes as "high-speed", it was not an unreasonable speed. It was one with which appellee's trial counsel undertook to and did cope.

POINT III

THE TIME LIMITATION IMPOSED DID NOT CREATE PREJUDICIAL ERROR.

It is respectfully submitted that appellant's counsel misstates the case when he asserts in his brief that:

> ".... an entire line of questioning regarding the refrigerator door, the second major element of plaintiff's two-fold claim was left unchallenged." (p. 15)

In the first place the March 8, 1973 incident involving the refrigerator door (34a -36a), far from being a major element was not even a new element. Appellee did not on the trial claim that there was anything wrong with the chill box door. He testified, in substance, that when he put his left shoulder against the door he felt a "never before-experienced pain in his left shoulder", as a result of which he could not hold the door so that he had to let it go and it closed on his fingers injuring them (34a, 35a). In fact, appellee testified that he had put his shoulder against the door in the same manner ".... as I did so many, many times on other ships ...." (35a)

It is thus the essence of appellee's testimony that he considered the chill box door incident to have been a consequence of the residual effects of the shoulder injury and not an independent or new accident.

In the second place, appellee did not claim on the trial that the incident involving the chill box door had in any way enlarged his shoulder injury and/or his period of disability. Nor was any claim made on the trial that the injury to the fingers was a separate or an additional element of damage. Appellee's trial counsel in his summation to the jury (210a-223a) limited his claims for damages to those periods in which appellee testified he had received treatment to his shoulder (38, 39a, 220a).

In fact, appellant's brief does not deny that the period during which the finger was treated did not extend beyond the date on which treatment to the shoulder was terminated (p. 7); thus, the subsequent assertion in the same brief (p. 13) that

> "As a result of the finger fracture, plaintiff was under treatment from March 11, until May 10, 1973, and therefore claimed an <u>additional</u> two months disability .... (and) <u>additional</u> lost earnings of $1500-- ...." (Emphasis supplied)

is both an inaccurate and a misleading interpretation of the record, which record, clearly discloses that the finger fracture had in no way enlarged and/or enhanced the second period of disability and loss of earnings consequent thereon -- both of which were brought about primarily and basically by reason of the resumption of causally related treatment for the original injury to the left shoulder; and not because of the incidental treatment which appellee testified, he had received to the finger (38a) within the same period.

Appellant's brief elects to characterize the incident involving the chill box door as being factually "strange" and its relationship to the shoulder injury as "questionable" and as "disputed" (pp. 10, 11). (Emphasis supplied)

When asked about this incident by his trial counsel, appellee's medical expert, Dr. Golub, obviously did not think the incident strange and he had no hesitancy in testifying that the incident was causally related to the original left shoulder injury, giving it as his opinion that this incident had occurred as a result of ".... an aggravation, a painful aggravation of his pathology at that time (98a, 99a).

Appellee had testified concerning this pain and how it had brought on the incident (34a, 35a).

It is therefore strange that appellant's counsel, who in his brief now complains that on the trial he was deprived of the opportunity of challenging the causal relationship between the shoulder injury and the chill box door (p. 11) there failed to address even one solitary question on this issue to his own medical expert, Dr. Lodico, whose direct testimony extends over 15 pages of the record (112a - 127a); nor did he avail himself of this opportunity on his re-direct examination of that witness (145a - 147a). Counsel's complaint is indeed remarkable, where by his own choice he did forego the opportunity of challenging Dr. Golub's testimony on cross-examination and/or by eliciting contradictory testimony from Dr. Lodico; under circumstances where Dr. Golub had already completed his testimony (88a - 108a).

The record does not substantiate appellant's contention that there was committed an error

> ".... so prejudicially erroneous as to require the cause to be remanded for a new trial."
>
> Severi v. Seneca Coal and Iron Corporation, 381 F. 2d 482, 489 n. 7 (2 Cir. 1967);

and, on the contrary, the record does establish that if any errors were committed during the course of the trial they

> ".... did not affect the substantial right of the parties ...."; and are to be disregarded.
>
> United States v. Heyward-Robinson Company, 430 F. 2d 1077 (2 Cir. 1970).

Appellee submits that the approach on and throughout the trial by appellant's counsel to the chill box incident, indicates that said counsel did not then consider that incident to be an element of importance, major or otherwise. Indeed, when the Court imposed the time limit on him (177a), the record shows that counsel's response was:

> MR. CARR: I have a few more questions. (178a) (Emphasis supplied)

The conclusion is inevitable therefore that the chill box incident was elevated to the status of a substantial factor in the case only in retrospect in light of the jury verdict adverse to appellant and merely as a vehicle for the appeal.

CONCLUSION

APPELLANT DOES NOT DEMONSTRATE THAT PREJUDICIAL ERROR WAS CREATED. THE TRIAL JUDGE'S DENIAL OF THE MOTION

FOR A NEW TRIAL WAS PROPER.

Respectfully submitted,

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SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: 6/26/74

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Attorney for